

EB68ENCT

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 LUIS ENCALADA, FLORINEL AILINCA,  
5 ALEJANDRO ANGELES, BENJAMIN  
6 GUTIERREZ, JUNIOR PENA, MOISES  
7 PEREZ, KAREEN SANCHEZ, FEDERICO  
8 SCARRO, RADOLFO TELES and  
9 ANGELICA VELASQUEZ,

10 Plaintiffs,

11 v.

12 13 Cv. 1926 (PAC)

13 SDNY 19 MAD PARK, LLC, d/b/a  
14 SD26, and ANTONIO MAGLIULO,

15 Defendants.

16 -----x

17 November 6, 2014  
18 10:15 a.m.

19 Before:

20 HON. PAUL A. CROTTY

21 District Judge

22 APPEARANCES

23 JOSEPH & KIRSCHENBAUM LLP  
24 Attorneys for Plaintiffs  
25 BY: MATTHEW KADUSHIN  
JOSEF NUSSBAUM

PILLINGER, MILLER & TARALLO, LLP  
Attorneys for Defendant Antonio Magliulo  
BY: JEFFREY T. MILLER  
LAWRENCE J. BUCHMAN  
ALAN L. KORZEN

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1 (Trial resumed)

2 THE COURT: I have my decision that I am going to read  
3 into the record.

4 The week before the trial, last Friday, the parties  
5 agreed to proceed with a bench trial in this matter. The  
6 parties have stipulated to various facts in their joint  
7 pretrial order. The defendants stipulated that the initial  
8 jury charge, proposed by plaintiffs, were accurate statements  
9 of the law and did not offer any counter requests to charge.

10 The trial began on November 3, 2014 and lasted three  
11 days. During those three days, we heard from seven witnesses  
12 for the plaintiff: Ms. Pliskin, Mr. Scarro, Mr. Perez, Mr.  
13 Encalada, Mr. Gutierrez, Ms. Vasquez, and Ms. Sanchez. We also  
14 heard from two defendant witnesses: Mr. Lombardozzi and Mr.  
15 Magliulo. We had deposition excerpts offered by the plaintiff  
16 and the defendant.

17 The plaintiffs offered numerous exhibits into  
18 evidence. Most of these exhibits were plaintiffs' payroll  
19 stubs and clock-in and clock-out records as well as deposition  
20 testimony. The defendants introduced into evidence limited  
21 portions of the deposition testimony of Mr. Teles and Mr. Pena.

22 On the claims asserted by plaintiffs Luis Encalada,  
23 Florinel Ailincă, Alejandro Angeles, Benjamin Gutierrez, Junior  
24 Pena, Moises Perez, Federico Scarro, Radolfo Teles, the  
25 so-called "food service" plaintiffs, and Angelica Velasquez and

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1 Kareen Sanchez, the "coat check" plaintiffs, for unpaid minimum  
2 wages, overtime wages, and misappropriated tips under the Fair  
3 Labor Standards Act and New York Labor Law for the time they  
4 worked at SD26 and/or San Domenico, from March 13, 2007 until  
5 on or about November 9, 2013, the Court finds as follows:

6 With respect to whether Mr. Magliulo was the  
7 plaintiffs' employer under the Fair Labor Standards Act and New  
8 York Labor law, in determining who is an employer within the  
9 meaning of these two acts, the Court employs an economic  
10 realities test, articulated by the Second Circuit in *Carter v.*  
11 *Dutchess Community College*. The four factors considered under  
12 this test are whether the defendant had the power to hire and  
13 fire the employees, supervised the work schedules or conditions  
14 of employment, determined rates and methods of payment, or  
15 maintained employment records.

16 I find by a preponderance of the evidence that based  
17 on Mr. Magliulo's deposition and credible testimony, and the  
18 stipulations made and his testimony here in court, that the  
19 *Carter* test for employment is satisfied and that Mr. Magliulo  
20 is an employer within the meaning of both the Fair Labor  
21 Standards Act and the New York Labor Law.

22 First, Mr. Magliulo had the power to hire or fire  
23 employees. The parties stipulated that Mr. Magliulo was  
24 involved with the day-to-day management of both restaurants.  
25 Mr. Magliulo testified that he made the ultimate hiring and

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1 firing decisions and that Stefano Lombardozzi did not possess  
2 the ultimate authority to hire or fire.

3 The Court also heard testimony from Mr. Perez, who  
4 recounted an instance where defendant exercised his  
5 disciplinary power and disciplined a server who refused to  
6 clean a table. According to Mr. Perez, when the server  
7 declined to follow Mr. Magliulo's instructions to clean the  
8 table, Mr. Magliulo replied "when you work at San Domenico, you  
9 do what I say." Rather than be disciplined, the server quit.

10 Second, Mr. Magliulo had the power to supervise work  
11 schedules and conditions of employment. Both Mr. Lombardozzi  
12 and Mr. Magliulo testified that Mr. Lombardozzi's initial  
13 schedules were subject to management approval. Therefore,  
14 contrary to plaintiffs' allegations, Mr. Lombardozzi did not  
15 have ultimate control over the scheduling of work -- Mr.  
16 Magliulo did.

17 This is supported by Mr. Perez's testimony that on one  
18 occasion he observed Mr. Magliulo complain to Mr. Lombardozzi  
19 that the restaurant was over-staffed on slow days. Mr. Perez  
20 testified that after Mr. Magliulo made these complaints, Mr.  
21 Lombardozzi re-arranged the staff.

22 Third, Mr. Magliulo had the power to set rates of pay.  
23 During his deposition, Mr. Magliulo testified that he set all  
24 compensation policies. And at trial, Mr. Magliulo testified in  
25 detail about his reluctance to have staff work double shifts

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1 and described having to pay time-and-a-half wages to tired  
2 employees as "asinine." Therefore, even if Mr. Magliulo was  
3 only a partial owner of SD26, he ran the day-to-day operations.  
4 Based on these facts, the Court is satisfied that Mr. Magliulo  
5 had the power to set rates of pay.

6 The fourth factor deals with Mr. Magliulo's  
7 maintenance of employment records. No evidence was presented  
8 at trial which indicated that Mr. Magliulo maintained these  
9 records. These are records that should have been maintained  
10 but were not maintained as the law requires. Therefore, this  
11 factor also weighs in favor of Mr. Magliulo being deemed the  
12 employer.

13 Based on all these factors, and considering the  
14 totality of the circumstances and the evidence presented, the  
15 Court has no hesitation in labeling Mr. Magliulo as an employer  
16 of plaintiffs in both San Domenico and SD26 under the FLSA.

17 Also, since the New York Labor Law employs a similar  
18 definition of employer, using these factors, similar to the  
19 ones I have just outlined, the Court finds by a preponderance  
20 of evidence that Mr. Magliulo was also an employer within the  
21 meaning of the New York Labor Law.

22 Now, with that out of the way, we turn to the details  
23 of the plaintiffs' complaint.

24 The second issue is whether the plaintiffs were paid  
25 for their hours worked under the Fair Labor Standards Act and

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1 New York Labor Law.

2 Based on the substantial documentary evidence  
3 introduced by plaintiffs, clear discrepancies existed between  
4 the amount of time plaintiffs were clocked in and the amount of  
5 time they were paid. Plaintiffs' hours were routinely capped  
6 at or reduced to a certain number, despite evidence  
7 demonstrating that plaintiffs worked more hours.

8 Mr. Magliulo offered an explanation as to the  
9 discrepancy and suggested there were times when plaintiffs were  
10 clocked in but were not working. This is anecdotal evidence  
11 and was not supported by the copious records that demonstrated  
12 just the opposite.

13 The testimony from the plaintiffs themselves, and from  
14 Mr. Lombardozzi, indicates that when plaintiffs were clocked  
15 in, they were working. Nothing contradicts the records  
16 supporting this claim. Therefore, plaintiffs have met their  
17 burden of proof and Mr. Magliulo failed to provide the Court  
18 with any evidence to the contrary. If Mr. Magliulo did not  
19 believe that the clock-in and clock-out records were an  
20 accurate reflection, the burden was on him, as the employer, to  
21 provide the Court with alternative records. Similarly, if Mr.  
22 Magliulo did not want plaintiffs working overtime, the law of  
23 this circuit, as articulated in *Chao v. Gotham Registry*, 514  
24 F.3d 280 (2d Cir. 2008), required him to "make every effort to  
25 prevent" the performance of the overtime.

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1           Accordingly, I find that Mr. Magliulo failed to pay  
2 plaintiffs the correct hourly rates required by the Fair Labor  
3 Standards Act, Section 201, and the New York Labor Law, Section  
4 650.

5           The third issue is whether the plaintiffs were paid  
6 spread of hours.

7           The records introduced by plaintiffs show that the  
8 workday frequently covered more than 10 hours. The payroll  
9 records do not show spread-of-hour payments, and defendant  
10 concedes on this issue.

11           To the extent that the clock-in and clock-out records  
12 demonstrate that plaintiffs worked over 10 hours in a single  
13 day, plaintiffs are entitled to spread-of-hours pay pursuant to  
14 Title 12 of the New York Regulations, Section 146-1.6.

15           The fourth issue is whether the plaintiffs were given  
16 the required wage notice requirements.

17           Each plaintiff testified that they never received  
18 annual wage notices and that the basis of their hourly rate was  
19 never explained to them. Defendant offered no evidence to the  
20 contrary and conceded on this issue as well. Therefore, I find  
21 that Mr. Magliulo violated New York Labor Law, Section 195.

22           The fifth issue is whether the plaintiffs were given  
23 notice of the tip pool, as required by the FLSA and New York  
24 Labor Law.

25           It is undisputed that plaintiffs were not provided

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1 with the required tip pool disclosures.

2 Mr. Magliulo failed to provide the tip-receiving  
3 plaintiffs with information required by the Fair Labor  
4 Standards Act, Section 3(m). Mr. Magliulo failed to inform the  
5 plaintiffs of their minimum wage; he failed to explain that the  
6 minimum wage would be reduced because a tip credit was claimed;  
7 and he failed to inform the plaintiffs of the amount of the tip  
8 credit.

9 Mr. Magliulo, therefore, failed to provide the  
10 tip-receiving plaintiffs with the notices required under the  
11 current Section 146-1.3 of Title 12, or the former Section  
12 137-2.2 of Title 12, for claims prior to January 1, 2011.

13 The sixth issue deals with whether the tip-receiving  
14 plaintiffs were subject to illegal deductions from the tip  
15 pool.

16 Plaintiffs claim that the managers and the polishers  
17 were not tip eligible and yet were included in the tip pool.

18 Turning first to the manager claims, specifically,  
19 plaintiffs' claim that Mr. Lombardozzi was ineligible for tips  
20 because he was a manager. The question of tip eligibility is  
21 not a word game; it does not matter what label was applied to  
22 any particular employee or whether the employee was called a  
23 maitre d' or a manager. The question is really, how do you  
24 analyze the employee's duties to determine if they are eligible  
25 for tips?



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1 Mr. Lombardozzi was not a manager; he was a maitre d'.  
2 The fact that each testifying plaintiff identified Mr.  
3 Lombardozzi as a manager was a deliberate attempt, I believe,  
4 to distort Mr. Lombardozzi's true title. Moreover, this tactic  
5 was at odds with what the plaintiffs stipulated to in the joint  
6 pretrial order. Stipulated fact number 25 was that Mr.  
7 Lombardozzi was the maitre d' of SD26.

8 Nevertheless, in his role as maitre d', I find that he  
9 was not eligible for the tips he received under the New York  
10 Labor Law, Section 196-d. The answers to the certified  
11 questions posed by the Second Circuit in *Barenboim v.*  
12 *Starbucks*, 995 N.E.2d, New York Court of Appeals 2013, are  
13 directly on point. The New York Court of Appeals stated that  
14 the relevant consideration is whether the employee had  
15 "meaningful authority or control over subordinates." The Court  
16 of Appeals further clarified that meaningful authority does not  
17 mean final authority.

18 Based on the facts as I find them, I conclude that Mr.  
19 Lombardozzi possessed this meaningful authority. While I  
20 accept both Mr. Lombardozzi's and Mr. Magliulo's testimony that  
21 he did not possess ultimate hiring or firing authority, or  
22 ultimate control over the schedule, Mr. Lombardozzi played a  
23 large part in each process. He frequently interviewed new  
24 employees. He frequently disciplined and/or fired existing  
25 employees. And he was responsible for creating the initial

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1 schedule each week. Therefore, even if Mr. Magliulo and Mr.  
2 Fanning had ultimate authority over these actions, and even  
3 accepting Mr. Magliulo's contention that 90 percent of Mr.  
4 Lombardozzi's actions related to customer service, the  
5 remaining 10 percent constitutes "meaningful authority" under  
6 *Starbucks*.

7 Therefore, the Court finds that Mr. Lombardozzi, and  
8 by extension, his assistant, are precluded from participation  
9 in the plaintiffs' tip pool.

10 Turning next to the polishers, the Court rejects the  
11 testimony that a special polisher role existed, whereby the  
12 polisher was completely separate from the dining services.  
13 Instead, I accept the testimony of Mr. Magliulo, that no such  
14 position existed and the polishers were busboys who were  
15 temporarily assigned to polish on certain nights. Therefore,  
16 the plaintiffs' claim that polishers should be excluded from  
17 the tip pool is denied.

18 The seventh issue is whether the coat check plaintiffs  
19 were employees or independent contractors.

20 In considering whether the coat check plaintiffs were  
21 employees or independent contractors, I rely on Mr. Magliulo's  
22 testimony that during the summer months, the coat check  
23 plaintiffs were part-time employees, who received the minimum  
24 wage during those months. During the winter months, however, I  
25 find that the coat check plaintiffs operated a concession, and

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1 I accept the evidence of Mr. Magliulo's ahead of that of the  
2 coat check plaintiffs, which I found to be lacking in  
3 credibility.

4 Therefore, during the winter months, the coat check  
5 plaintiffs were not employees, they were independent  
6 contractors, and the plaintiffs have failed to demonstrate  
7 otherwise. The fact that they also cleaned the restaurant's  
8 bathrooms is ancillary and does not justify an employee status.  
9 Moreover, the evidence provided by Mr. Magliulo conforms to the  
10 industrywide practice of contracting out cloakroom staff, who  
11 then became responsible for operating the cloakroom. It was  
12 under this arrangement that the Court finds that Ms. Velasquez  
13 was able to have her daughter, Ms. Sanchez, cover and assist in  
14 some shifts.

15 The eighth issue is whether Mr. Magliulo's violations  
16 were willful.

17 Prior to April 8, 2011, the definition of a willful  
18 violation under New York Labor Law, Section 198, was whether an  
19 employer knowingly violated the law. The Court finds that Mr.  
20 Magliulo's violations during this period were willful. He  
21 instituted a systematic policy of failing to pay workers for  
22 all the hours they worked and failed to provide the required  
23 wages and tip disclosures. Mr. Magliulo himself testified that  
24 he retained ultimate control over all aspects of the  
25 restaurant.

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1           The definition of willful under New York State Labor  
2     Law changed on April 9, 2011. Under the new definition, the  
3     burden shifts to Mr. Magliulo to prove that the violations were  
4     made in good faith. Mr. Magliulo has failed to introduce any  
5     evidence of good faith. Aside from introducing portions from a  
6     deposition unrelated to the issues of good faith, there is not  
7     any evidence to support a finding of good faith. Therefore,  
8     Mr. Magliulo failed to discharge his burden and the Court has  
9     no hesitation in determining that his violations were willful  
10    under the new definition because they were not made in good  
11    faith.

12           Now, with respect to the questions which were going to  
13    be submitted to the jury.

14           Question number 1. On plaintiffs' claims that  
15    Antonio Magliulo was plaintiffs' employer at SD26 under the  
16    Fair Labor Standards Act and New York Labor Law, the answer to  
17    that question is yes. Plaintiffs' claim is sustained. The  
18    verdict is for the plaintiff.

19           Question number 2. On the claim that at SD26  
20    employees were not paid for all hours worked, including  
21    overtime, I find for the plaintiffs.

22           On plaintiffs' claims that at SD26 they were not paid  
23    spread-of-hours pay, I find for the plaintiffs.

24           On the claim that they did not receive annual wage  
25    notices, I find for the plaintiffs.

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1           On the claim that they were not given adequate notice  
2 of the tip credit under the Fair Labor Standards Act, I find  
3 for the plaintiffs.

4           On plaintiffs' claims that at SD26 they were not given  
5 adequate notice of the tip credit under New York law for the  
6 time period before December 31, 2011, I find for the  
7 plaintiffs.

8           On the claim that the employees were not given  
9 adequate notice of the tip credit under New York law for the  
10 time period after January 1, 2012, I find for the plaintiffs.

11           On plaintiffs' claims that at SD26 managers and  
12 assistant managers were not eligible to participate in the tip  
13 pool, I find for the plaintiffs on that.

14           With respect to question number 9, as to whether the  
15 polishers were eligible to participate in the tip pool, I find  
16 for the defendants.

17           On the coat check plaintiffs' claims that they were  
18 defendants' employees, I find for the defendants.

19           The defendants' violations of the law were willful, as  
20 I have just explained.

21           I find that the violations after a point in time were  
22 not committed in good faith as required by the law.

23           Since plaintiffs were not paid for all hours worked,  
24 plaintiffs are owed for every hour they were clocked in and not  
25 paid, as set forth in Plaintiffs' Exhibits 14 and 15. Those

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1 records are the best evidence at the time that the plaintiffs  
2 worked during those weeks.

3 Question 14. Plaintiffs were not paid for all hours  
4 worked. Plaintiffs are owed unpaid time for the shifts that  
5 they clocked in for but did not clock out.

6 Since plaintiffs were not paid spread-of-hours pay,  
7 they are owed spread-of-hours pay for each record of a double  
8 shift worked, as set forth in the summaries in Plaintiffs'  
9 Exhibit 16.

10 I find that plaintiffs' summary of the total hours of  
11 lunch shifts and dinner shifts they alleged they worked, as set  
12 forth in Plaintiffs' Exhibit 16, is the best evidence of the  
13 total number of lunch shifts and dinner shifts plaintiffs  
14 worked.

15 With respect to the maitre d' and the assistant maitre  
16 d', the manager and the assistant manager, they are not  
17 eligible to participate in the tip pool. The polishers, as I  
18 previously indicated, are eligible to participate in the tip  
19 pool. That's the answer to question 17 and 18.

20 I find that the coat check plaintiffs are not  
21 employees, in answer to question 19.

22 With respect to the San Domenico restaurant, which is  
23 the predecessor of SD26, I find that Mr. Magliulo was Mr.  
24 Encalada and Mr. Perez's employer. Those two employees were  
25 not paid for all hours worked; they were not paid the spread of

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1 hours; they were not given adequate notice of the tip credit;  
2 and the managers and assistant managers were not eligible to  
3 participate in the tip pool. These violations of the law were  
4 willful.

5 That constitutes the Court's findings of fact and  
6 conclusions of law.

7 I direct that the plaintiff prepare a schedule  
8 tabulating the pay and the amount of money that is due and  
9 owing pursuant to the findings of fact and the conclusions of  
10 law that I have made. You are to do that within the next ten  
11 days, by Friday, the 14th of November. Do it on three days'  
12 notice to the plaintiffs. And I will be prepared to sign the  
13 order on the following Monday.

14 MR. KADUSHIN: Three days' notice to the defendants?

15 THE COURT: Three days' notice to the defendants.

16 MR. KADUSHIN: May I clarify one point, your Honor?

17 THE COURT: Yes.

18 MR. KADUSHIN: Regarding question number 14, if you  
19 answered yes, how many hours plaintiffs are owed for each lunch  
20 shift and dinner shift, you want us to put that information,  
21 what we believe the testimony is, based upon the record?

22 THE COURT: Yes.

23 MR. KADUSHIN: Then the same question regarding 17,  
24 regarding how much we believe each party was injured per shift,  
25 based upon the evidence that is in the record currently?

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1 THE COURT: That's what I mean.

2 MR. KADUSHIN: Thank you for the clarification.

3 MR. BUCHMAN: I have got two questions, your Honor.

4 So what you are saying is that we are getting three  
5 days to review and do rebuttal on their tabulation of damages?

6 THE COURT: Correct.

7 MR. BUCHMAN: We can't get any more time than three  
8 days?

9 THE COURT: How much more time do you want?

10 MR. BUCHMAN: They are getting ten days to present.  
11 Can we get ten days?

12 THE COURT: They have got to submit it in ten days.  
13 They have got seven days.

14 MR. BUCHMAN: Can we get the same seven to review?

15 THE COURT: All right.

16 MR. BUCHMAN: As far as any posttrial motions we may  
17 want to make when we purchase the transcript, I have looked in  
18 the local rules and I didn't see anything in your specific  
19 rules if we wanted to do any posttrial motions.

20 THE COURT: What posttrial motions do you want?

21 MR. BUCHMAN: I am not sure. I would like to look at  
22 the transcript.

23 THE COURT: The rules provide for you to make a  
24 motion. I am pretty confident on this, but you can make your  
25 motion. Today is the 6th. I want the defendants to submit



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1 their calculations and serve them on you by the 12th.

2 MR. KADUSHIN: You mean plaintiffs, your Honor.

3 THE COURT: The plaintiffs to submit their  
4 calculations to the defendant by Wednesday the 12th. That's  
5 five workdays. By the 19th of November, you can submit  
6 whatever response you have. And I will sign the order on this  
7 by Friday the 21st.

8 You can have 20 days on which to contemplate making  
9 your motion. That will bring it to the 24th. OK?

10 MR. BUCHMAN: Thank you, your Honor.

11 MR. KADUSHIN: I apologize, your Honor. On the 12th,  
12 we are to submit the calculations to defendants and file it on  
13 ECF simultaneously?

14 THE COURT: Yes.

15 MR. KADUSHIN: We can do that by letter, your Honor?

16 THE COURT: By letter or --

17 MR. KADUSHIN: With an attached spreadsheet, your  
18 Honor? The letter explanation and an attached spreadsheet?

19 THE COURT: Yes.

20 MR. KADUSHIN: Thank you, your Honor.

21 THE COURT: Why do you need that authorization? You  
22 already have a spreadsheet, don't you?

23 MR. KADUSHIN: Correct. I just wanted clarification  
24 that we would submit a letter and attached to the letter a  
25 spreadsheet summarizing the damages.

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1 THE COURT: Yes.

2 That was your understanding too.

3 MR. BUCHMAN: I was just checking to make sure  
4 Thanksgiving didn't get involved in it.

5 THE COURT: Thanksgiving is not until the 27th.

6 MR. KADUSHIN: Your Honor, may we also attach a  
7 proposed order and entry of judgment?

8 THE COURT: Yes.

9 The 24th is the date for your making your motion,  
10 correct?

11 MR. BUCHMAN: Yes, your Honor.

12 THE COURT: If you decide earlier not to make the  
13 motion, please let us know. But if you want to make a motion,  
14 you have to make it by the 24th.

15 You can respond in ten days?

16 MR. KADUSHIN: That's fine, your Honor.

17 Mr. Nussbaum is Canadian so he doesn't celebrate  
18 Thanksgiving.

19 THE COURT: He has already had his Canadian  
20 Thanksgiving, right?

21 MR. NUSSBAUM: October.

22 THE COURT: October has passed.

23 The 24th. And you get ten days, that includes  
24 Thanksgiving. So that will bring us to -- do it by the 5th of  
25 December, your response. Then the reply would be by the 12th.

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1 MR. KADUSHIN: Then the date on which we would submit  
2 our application for attorneys' fees would be at what point,  
3 your Honor?

4 THE COURT: Well, after I enter judgment, I suppose.

5 MR. KADUSHIN: Maybe we should wait until we respond  
6 to defendants' motion and include that number as well.

7 THE COURT: It's up to you. Probably that's the  
8 better way to do it, Mr. Kadushin, so we will have a complete  
9 record.

10 MR. KADUSHIN: That's fine, your Honor.

11 THE COURT: OK. Anything else?

12 MR. BUCHMAN: No, your Honor. Thank you.

13 MR. KADUSHIN: Thank you, your Honor.

14 THE COURT: Thank you.

15 (Adjourned)

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